83-1055

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

DENNIS HAHN,

Petitioner,

v.

BRYANT-POFF, INC.,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED UPON APPEAL

I. Does the Equal Protection Clause of the Fourteenth Amendement to the Constitution of the United States apply to all people in the State of Indiana or just to those persons who may be fortunate enough to have been born the child of a judge of the Indiana Court of Appeals?

II. Assuming that each citizen, even of the State of Indiana, is entitled to equal protection of the law, is the so called open and obvious danger rule applied equally to a Court of Appeals judge's son for whom the Indiana Supreme Court stated that such a rule was a question of fact for a jury and to Dennis Hahn for whom the same Supreme Court allowed this rule to be a question of law for the court and not a jury?

LIST OF PARTIES TO THE PROCEEDINGS

All parties to the proceedings are reflected by the caption of this cause in this Court.

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No._____

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

The petitioner, Dennis Hahn, hereinafter designated as "Dennis," respectfully prays that a Writ of Certiorari be issued to review the judgment and order of the Supreme Court of Indiana denying the petitioner's request for transfer entered on the 29th day of September, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals of Indiana, First District, dated December 22, 1982, is reported at 454 N.E.2d 1223 (Ind.App. 1982) and is set out in the Appendix at pages A-1 through A-9. A rehearing was denied. (See Appendix, pages A-19 and A-20.) The Supreme Court of Indiana denied Dennis' request for transfer. (See Appendix, pages A-30 and A-31.) Justice Hunter filed a vigorous dissent to the action of the Supreme Court of Indiana. (See Appendix, pages A-32 through A-51.) Justice DeBruler concurred with Justice Hunter's dissent.

JURISDICTION

The judgment of the Court of Appeals, First District, was entered on December 22, 1982, and Dennis' request for rehearing before that court was denied on January 27, 1983. The Supreme Court of Indiana denied Dennis' petition for transfer of this case

on September 29, 1983. A notice of appeal from that final judgment was filed with the Supreme Court of Indiana on December 21, 1983, as required by Rule 10 of the Supreme Court of the United States.

This Court's jurisdiction is involved pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States provides:

UNITED STATES CONSTITUTION
FOURTEENTH AMENDMENT § 1

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. CONST. AMEND. XIV, §1.

STATEMENT OF THE CASE

A. Course of Proceedings Below

This was a civil action filed by Dennis for personal injuries sustained at his place of employment on June 21, 1977, near Letts, Indiana.

Bryant-Poff, Inc., the respondent herein, was the designer, manufacturer and installer of a certain grain elevator from which Dennis received severe and lasting personal injuries on June 21, 1977.

Dennis proceeded against the respondent on multiple theories including strict liability in tort as set forth in § 402A of the Restatement of Torts, Second, and negligence.

This cause was tried to a jury of the Morgan County Circuit Court. On October 5, 1981, the jury returned a verdict in favor of Dennis and assessed his damages in the sum of Six Hundred Sixty-three Thousand

Dollars ($663,000.00). The trial court entered judgment in accordance with the verdict on October 8, 1981.

The respondent filed its Motion to Correct Errors, which was denied by the trial court. The respondent then perfected an appeal to the Court of Appeals of Indiana, First District. The appellate court reversed the trial court. The opinion of the appellate court is a part of the Appendix, pages A-1 through A-9.

Dennis filed a timely petition for rehearing before the Court of Appeals of Indiana, First District, which was denied on January 27, 1983. (See Appendix, pages A-10 through A-18, and A-19 and A-20.)

Dennis then filed a petition to transfer the cause to the Supreme Court of Indiana on February 15, 1983. (See Appendix, pages A-21 through A-29.)

The Supreme Court denied Dennis' petition for transfer on September 29, 1983, in

a 3-2 decision. A copy of this order along with the published dissent of Justice Hunter can be found in the Appendix at pages A-30 and A-31, and A-32 through A-51.

On May 4, 1983, the Supreme Court of Indiana issued the opinion of Hoffman v. E.W. Bliss Company, ___Ind.___, 448 N.E.2d 277 (Ind. 1983). (See Appendix, pages A-56 through A-110 for opinion.) Kent W. Hoffman, the plaintiff-appellant in the above-captioned case is the son of the Honorable George B. Hoffman, Jr., Judge of the Court of Appeals of Indiana, Third District. Here, the Supreme Court reversed and remanded a trial court judgment in favor of the defendant, Bliss, and decided that whether the danger of the product involved was a latent one or was "open and obvious" was a question of fact for the jury to determine.

The decision adverse to Dennis in the instant cause was filed by the Supreme

Court of Indiana on September 29, 1983, four months after Hoffman, supra.

B. Raising the Federal Constitutional Questions

Dennis first raised the federal question presented here in his petition for rehearing on the denial of transfer by the Supreme Court of Indiana. This petition was filed on October 18, 1983, and was the earliest opportunity that Dennis had to raise such questions. This petition for rehearing on denial of transfer appears in the Appendix at pages A-52 through A-56.

On October 24, 1983, the Supreme Court of Indiana summarily denied Dennis' petition for rehearing and rejected his constitutional claims. (See Appendix, page A-57.)

C. The Material Facts Necessary for Consideration of the Questions Presented

Sometime prior to the incident in question, the respondent designed, manufactured, constructed and installed a grain

elevator leg for the Farm Bureau Co-op in Letts, Indiana. This elevator leg was constructed without a guard on its motor, chain and sprocket. No oral or written warnings or operational instructions had ever been given by the respondent to the Co-op or its employees. The employees had learned to operate the machinery by trial and error. The electric motor, chain and sprocket with an attached maintenance platform were all elevated some 90 feet in the air. This equipment was not visible from the operator's ground floor station. Neither the operator's station nor the motor site were equipped with electrical air disconnect switches as required by several standards.

This elevator leg was a necessary piece of equipment for successful grain farming operations. It was used as a vertical conveyor to transport grain, other farming supplies, products and necessities

from ground level to higher or lower storage or distribution areas. The vertical conveyor was powered by an electrical motor, chain and sprocket device located at the top of the elevator leg which raised conveyor buckets from ground level to the various distribution and storage bins. The motor driven chain and sprocket was located approximately four feet above a platform provided by the manufacturer to allow maintenance and service work to be done.

The chain and sprocket were never guarded although numerous other chains and sprockets and belts and pulleys throughout the facility were guarded. The machine in question remained unchanged from the date the respondent turned it over to the Farm Bureau Co-op until Dennis' injury. When the machinery was turned over to the Farm Bureau Co-op by the respondent, there were no instructions received from it con-

cerning the operation of the electrical equipment on the elevator.

The operator's station where the equipment would be controlled was on the first floor inside a building directly underneath the grain elevator. As a result, the top of the elevator leg was obscured from the operator's vision. At this position there was a console with a number of buttons to operate various electrical equipment throughout the facility.

On June 21, 1977, Dennis had turned 18 and he had just completed his junior year in high school. On that day he was working on the 90 foot platform painting parts of the elevator leg when an unguarded chain and sprocket was inadvertently activated causing the eventual loss of his right arm just below the elbow.

Dennis grew up wanting to be a farmer. He attended high school in Decatur County, Indiana, and took courses in agriculture.

Beginning in September of 1976, his junior year in high school, he began in a school work program where he would go to school in the mornings and to work about noon at the Letts facility in question.

During his program with the Co-op, he performed general labor, cleaning soybeans and wheat, cleaning out bins, unloading semi-trucks, and loading up sacks of feed for customers of the Co-op.

Dennis had never activated the motor on the 90 foot elevator leg. To his knowledge, there were no other places other than those on the first floor from which the grain elevator leg could be activated.

In the basement of the facility, directly underneath the main console and accessible only by means of a spiral staircase, there was a room called a power room in which there were a number of fuse disconnects. Dennis had never operated any of these disconnects in the power room,

nor did he know anything about their operation.

On the 21st of June, 1977, during a slack period, he was told to go up and paint the top of the elevator leg with Bill Evans, one of the older persons who worked at the Co-op. Dennis had never been on the platform next to the motor, chain and sprocket.

Dennis painted for approximately one hour, and he was unaware of any problems or of any dangers connected with the chain and sprocket. During this time, Dennis did not have any reason to fear the chain and sprocket. The equipment was not moving nor had it moved while Dennis was up there. In fact, Dennis had never observed this equipment operate. The chain was loose and hanging. Dennis felt comfortable up on the platform and was not nervous. He knew nothing of any "on" or "off" switches and was totally unprepared in regard to

protecting himself and knowing about the presence or absence of any start/stop devices near the motor.

The motor, chain and sprocket did not look dangerous to Dennis, and it did not look like a dangerous thing to be around. He did not think that the machinery was capable of causing serious bodily injury.

Dennis had never been instructed on how to operate any of the equipment or shown any of the switching or electrical devices on the elevator leg. He had never operated them, and he was not familiar with them or their methods of operation, nor were there any instructions or warnings provided by the respondent on the machinery or anywhere else.

After painting for approximately one hour, Dennis was ready to come down from the platform. As Dennis turned to climb down, he noticed about a three inch square

rust spot behind the sprocket on the back side of the motor's shaft and he turned around to paint the rust spot. At this exact moment, Co-op manager Steve Smith, unable to see the two men on the elevator leg, started the machine from the ground floor operator's station. As the motor was turned on, the chain instantly and without warning whipped up and threw Dennis' arm into the sprocket.

REASONS FOR PLENARY CONSIDERATION

I. THE EQUAL PROTECTION CLAUSE APPLIES TO ALL CITIZENS OF THE STATE OF INDIANA AND NOT JUST TO THOSE FORTUNATE PERSONS WHO ARE BORN THE SON OF A JUDGE OF THE INDIANA COURT OF APPEALS.

The Supreme Court of Indiana, by refusing to grant Dennis' petition for transfer and petition for rehearing on the denial of the petition to transfer, has denied Dennis equal protection of the laws in light of the Hoffman v. E.W. Bliss Company, ___Ind.___, 448 N.E.2d 277 (1983)

opinion.

Equal protection and application of the laws goes to the very heart of the American ideal of fairness. As noted by this Court in the opinion of Bolling v. Sharpe, 347 U.S. 497 (1954):

> But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and therefore, we do not imply that the two are always interchangeable phrases.

347 U.S. 497, 498, 499.

The Equal Protection Clause of the Fourteenth Amendment calls for evenhandedness in the application of the laws of the sovereign. Justice Stevens recently observed that:

> The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." The Clause announces a fundamen-

> tal principle: the State must govern impartially. General rules that apply to all persons within the jurisdiction unquestionably comply with the principle. Only when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether this principle is violated arise.

New York City Transit Authority v. Beazer, 440 U.S. 568, 587-588 (1979). See also Lehr v. Robertson, ___U.S.___, 103 S.Ct. 2985, 2995-2996 (1983).

It has also been noted that the promise of equal protection of the laws not only involves the enactment of fair laws but also the fair application of the laws. For example, in the opinion of United States v. Falk, 479 F.2d 606 (7th Cir.1973), the Court held: "Promise of equal protection of laws is not limited to enactment of fair and impartial legislation, but necessarily extends to application of these laws." Furthermore, unequal application

of a law, fair on its face, may act as a denial of equal protection. Zeigler v. Jackson, 638 F.2d 776 (5th Cir.1981). In short, Dennis contends that the Equal Protection Clause applies to all citizens of the state of Indiana.

II. THE INDIANA SUPREME COURT FAILED TO APPLY THE LAW EQUALLY WHEN IT DECIDED THAT THE OPEN AND OBVIOUS RULE WAS A QUESTION OF FACT FOR A JURY IN A CASE INVOLVING THE SON OF AN APPELLATE COURT JUDGE BUT FOUND THE OPEN AND OBVIOUS RULE TO BE A QUESTION OF LAW FOR THE COURT AND NOT FOR THE JURY IN THE PETITIONER'S CAUSE.

Dennis submits that the Indiana Supreme Court failed to evenly and fairly apply the law when deciding his case and therefore denied him the equal protection of the laws.

In order to fully appreciate Dennis' argument here, a review of the Hoffman, supra, opinion is necessary. The plaintiff-appellant, Kent W. Hoffman, is the son of the Honorable George B. Hoffman, Jr., a member of the Court of Appeals of Indiana,

Third District. (See Affidavit of Kent W. Hoffman, Appendix, pages A-63 and A-64.) Mr. Hoffman was injured at his place of employment by a metal punch press. The particular punch involved was used to make impressions in pieces of sheet metal. An explanation of the operation of the machine is important in understanding Mr. Hoffman's claim for injuries.

> This particular press used a hydraulic power system to provide sixty (60) tons of pressure to punch the impressions in the pieces of sheet metal being processed. The basics of the mechanical operation of the press are as follows. The shape and size of the impression to be punched out are controlled by two dies. The functional area of the machine, the point of operation, is a large flat area. Two dies are attached to the press in the point of operation area. The lower die is stationary while the upper one is attached to the essential moving part of the machine, the ram. In a single operational cycle, the ram with die attached descends to smash out the desired impression and then returns to its position above the point of operation. After several cycles

> have been run, the pieces cut out of the production material must be removed from the point of operation to prevent misalignment of the new production material to be put in the lower die.

448 N.E.2d 277, 278.

On the date of Hoffman's accident, March 4, 1976, Hoffman had been assigned for the first time to operate the machine in question. 448 N.E.2d 277, 279. Hoffman testified that while the machine was in a resting position, he reached into the point of operation beneath the ram of the machine in order to remove some scraps of material. While his right hand was in this area, and without activation or warning to Hoffman, the ram of the machine suddenly activated and crushed Hoffman's right hand. 448 N.E.2d 277, 280. Hoffman filed suit premising liability on Section 402A of the Restatement (Second) of Torts (1965).

At the conclusion of the trial, a jury

returned a verdict against Hoffman. Mr. Hoffman then perfected a timely appeal to the Indiana Supreme Court. (The matter was initially appealed to the Court of Appeals, but pursuant to Indiana Rules of Appellate Procedure 15(M), the appeal was transferred to the Supreme Court for adjudication.) 448 N.E.2d 277. 278.

The plaintiff-appellant Hoffman appealed on the issue of an instruction given by the trial court. 448 N.E.2d 277, 280. The Supreme Court decided error had been committed by the giving of the instruction in controversy. The Court also went on to hold that the "open and obvious danger rule" would not bar Mr. Hoffman's claim. In rejecting the "open and obvious danger" defense, the Supreme Court held:

> Bliss contends the open and obvious danger rule of the Bemis case precludes any recovery for Hoffman in the case at bar because Hoffman testified he was aware of dangers of the machine.

He testified he knew that "the way that machine was set up you could get your hands in it." Further, when asked if the reason he took his foot off the foot pedal each time he reached into the point of operation was "because it was obvious to you what the dangers were" he answered, "Yes."

We cannot agree with Bliss that this testimony brings this case within the Bemis holding, nor does the evidence viewed as a whole. The question turns on how broadly one construes the word "danger" in the "open and obvious danger rule." Certainly we can say it was undisputed in one sense that Hoffman knew the injury-producing mechanism of the machine was an "open and obvious danger." That mechanism was clearly visible. . . .

However, Hoffman's theory as to the cause of the accident was that due to some internal malfunction or defect in the operating mechanisms of the press, and the concurrent failure of Bliss to warn of this defect, the ram descended without being activated by him. It is clear that whatever this defect or malfunction was, neither Hoffman nor anyone else could see it without making the kind of inspection the user of the product in a § 402A action is not expected to have made. . . .

> . . . It is quite another to excuse him from liability for injuries caused by mechanisms that due to a hidden defect cause it to operate or malfunction at a time when the user has every reason to expect it will not. A careful examination of the evidence in each case is necessary to determine whether the danger in the product is truly and entirely open and obvious.
>
> [9] In this case, given the theory of Hoffman as to the cause of the accident and the evidence he introduced to show how it could have occurred, we cannot say as a matter of law Hoffman's injury was caused by an open and obvious danger. . . .

448 N.E.2d 277, 285. (Our emphasis.)

In so ruling, the Supreme Court of Indiana remanded the Hoffman case back to the trial court for a new trial and thus gave Kent W. Hoffman a new opportunity to try his case before yet another jury. 448 N.E.2d 277, 286.

Dennis Hahn was not so fortunate. On December 22, 1982, the Court of Appeals of Indiana, First District, held:

> As a matter of law, therefore, we must hold that the chain and sprocket mechanism in the case at bar was an open and obvious danger upon which liability against the manufacturer may not be premised.

454 N.E.2d 1223, 1225. This holding is especially interesting in light of the Court's observation that: "Although there was evidence from which the jury could have concluded that the unguarded chain and sprocket mechanism was unreasonably dangerous in light of industry regulations and standards at the time it was designed and manufactured. . . ." 454 N.E.2d 1223, 1225. (Our emphasis.)

Dennis filed timely motions requesting review of the Court of Appeals judgment. All were denied.

Dennis contends that there is no logical or material factual or legal distinction between his cause and that of Kent W. Hoffman's case as far as the open and obvious danger rule is concerned. Both

plaintiffs were encountering the product for the first time. Both plaintiffs were dealing with a machine that was not engaged at the time they placed their hands and arms in the zone of operation. Both plaintiffs had no warning of the impending operation of the product that eventually mangled and destroyed their limbs. Both plaintiffs were not responsible for engaging the machine at the time of the incident.

The Hoffman, supra, case has not been overruled by the Indiana Supreme Court. Mr. Hoffman's case was given new life and allowed to return to the trial court for a new trial after an adverse jury decision. Dennis Hahn was not given that opportunity despite a successful verdict returned by the jury.

Recently, the Indiana Court of Appeals, First District, citing authority from this Court, held:

> Broadly speaking, the equal protection provisions in our constitutions insure that "all persons similary circumstanced shall be treated alike." Royster Guano Company v. Virginia, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989. . . .

Cunningham v. Aluminum Company of America, ___Ind.App.___, 417 N.E.2d 1186, 1192 (Ind.App. 1981).

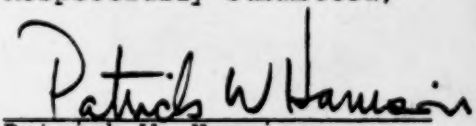
Dennis and Kent W. Hoffman are similarly circumstanced plaintiffs pursuing product liability actions against different manufacturers. The Supreme Court of Indiana ruled that the open and obvious danger rule did not apply as a matter of law in Kent W. Hoffman's case. This was on May 4, 1983. A few months later the Supreme Court of Indiana let stand the Court of Appeals decision in Dennis' case finding the open and obvious danger rule to operate as a matter of law. Similarly situated persons, Dennis and Kent W. Hoffman received different applications of the same rule of

law. It is this lack of "evenhandedness" that runs afoul of the Equal Protection Clause of the Fourteenth Amendment. New York Transit Authority v. Beazer, supra. For Dennis it is a burden and result that is constitutionally prohibited.

CONCLUSION

Wherefore, Dennis respectfully submits that a Writ of Certiorari should issue to review the Judgment and Opinion of the Supreme Court of Indiana.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have on this 23rd day of December, 1983, mailed three copies of this Petition for a Writ of Certiorari to the Supreme Court of Indiana, first class, postage prepaid, to:

David E. Lawson
Attorney at Law
110 S. Washington Street
Danville, IN 46122

Patrick W. Harrison

STATE OF INDIANA)
) SS:
COUNTY OF BARTHOLOMEW)

Subscribed and sworn to before me, a Notary Public, in and for said County and State, on this the 23rd day of December, 1983.

My Commission Expires:

February 16, 1986

Cathy J. Handly, Notary Public, Residing in Johnson County, Indiana

No.

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APPENDIX

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COURT OF APPEALS OF INDIANA

BRYANT-POFF, INC.,
Defendant-Appellant,

v.

Dennis HAHN,
Plaintiff-Appellee.

No. 1-382A71.

Court of Appeals of Indiana,
First District.

Dec. 22, 1982.

RATLIFF, Presiding Judge.

MEMORANDUM DECISION STATEMENT OF THE CASE

Bryant-Poff, Inc., defendant designer, manufacturer, and installer of a grain elevator leg, appeals from an adverse verdict and judgment in favor of plaintiff, Dennis Hahn, upon his complaint for negligence in a products liability action. We reverse.

FACTS

Bryant-Poff is an Indiana corporation in the business of designing, manufacturing, and installing grain elevators, feed mills, and other large farm equipment. In 1966

Bryant-Poff installed two grain elevator legs which it had designed the previous year for the Decatur County Farm Bureau Cooperative in Letts, Indiana. Bryant-Poff had designed, manufactured, and installed similar equipment in each of the ninety-two Indiana counties as well as in a three to five state area.

On June 21, 1977, eighteen-year-old Dennis was employed by the Decatur County Farm Bureau in Letts and was sent by the manager, Randy Smith, to do maintenance work on a platform ninety feet from the ground on one of the grain elevator legs designed, manufactured, and installed by Bryant-Poff. The elevator leg was used as a vertical conveyor to transport grain or other items from ground leval to storage or distribution areas. The vertical conveyor was powered by an electric motor with a chain and sprocket device located at the tip of the elevator leg. The motor driven

chain and sprocket were located approximately four feet above a maintenance platform which was ninety feet above ground level. Dennis had spent about an hour on the maintenance platform doing some painting when he reached his hand between the chain and sprocket to touch up a rust spot behind the sprocket. At that time the manager, from the ground floor operator's station, activated the chain and sprocket device resulting in the crushing and eventual amputation of Dennis's right arm below the elbow.

Bryant-Poff had provided at least two separate electrical cut-off devices which, if engaged, would have prevented electricity from reaching the motor that operated the chain and sprocket device above the maintenance platform where Dennis was injured. One device was a fuse disconnect in the power room located in the basement. A second electrical lock-out device was

provided at the ninety-foot maintenance platform which could be engaged from the fourth rung of the ladder prior to climbing onto the platform. This mechanism was rusted at the time of the incident and testimony conflicted as to whether or not instructions had been given on the operation of these cut-off devices. However, Dennis had not been instructed in the operation of any of the safety devices by Smith or others at the facility and had never been to the platform prior to this time. There was testimony that industry standards from at least 1957 required a barrier guard to be installed on chain and sprocket mechanisms less than seven feet above such a service platform.

Dennis brought this action asserting liability on theories of negligence and strict liability under § 402 A of the Restatement (Second) of Torts against Bryant-Poff on June 6, 1979, seeking com-

pensatory and punitive damages. Trial was begun September 28, 1981, and on October 5, 1981, the jury returned the following verdict: "We, the jury find for the Plaintiff against the defendant and assess his damages in the sum of $663,000.00." Record at 480. The trial court entered its judgment upon the verdict, and from this judgment Bryant-Poff appeals.

ISSUES

The issues Bryant-Poff raises can be summed up as follows:

1. Did the trial court err in refusing to grant Bryant-Poff's motion for judgment on the evidence?

2. Did the trial court err in giving or failing to give certain instructions?

3. Did the trial court err in failing to grant a mistrial based upon Dennis's exhibiting an inflammatory exhibit in violation of a pre-trial order?

4. Was the award of $663,000.00 com-

pensatory damages excessive, contrary to the evidence, and the result of passion or prejudice?

5. Did the trial court err in admitting the testimony of an economist as to Dennis's earning capacity?

DISCUSSION AND DECISION

Bryant-Poff argues that the trial court erred in refusing to grant its motion for judgment on the evidence for several reasons. Because we reverse on the basis of the Indiana Supreme Court's adherence to the open and obvious rule in the products liability-negligence area of the law, we discuss only this aspect of the issue.

Bryant-Poff correctly asserts that Indiana case law has established the open and obvious rule in our jurisprudence. See, e.g., Bemis Company, Inc. v. Rubush, (1982) Ind., 427 N.E.2d 833; Coffman v. Austgen's Electric, Inc., (1982) Ind.App.,

437 N.E.2d 1003. That rule was set forth clearly and unequivocally by Justice Pivarnik in Bemis at 427 N.E.2d 1061: "In the area of products liability, based upon negligence or based upon strict liability under § 402A of the Restatement (Second) of Torts, to impress liability upon manufacturers, the defect must be hidden and not normally observable, constituting a latent danger in the use of the product." Although there was evidence from which the jury could have concluded that the unguarded chain and sprocket mechanism was unreasonably dangerous in light of industry regulations and standards at the time it was designed and manufactured, we do not read Bemis, Shanks and Coffman to permit liability to attach when that defect should have been obvious to the party injured. In Coffman a twelve-year-old boy was injured when the power suddenly went on as he was attempting to

remove a bird's nest from a hopper bin on a malfunctioning cross-auger shaft. The Coffmans brought suit against the manufacturer alleging negligence in failure to place a guard over the auger shaft and improper design of a control panel which permitted the inadvertent operation of the auger. Having cited the open and obvious rule of Bemis, Judge Hoffman wrote, "Clearly, the potentiality of danger inherent in sticking one's hand in an auger which has the propensity to move is open and obvious." 437 N.E.2d at 1008. As a matter of law, therefore, we must hold that the chain and sprocket mechanism in the case at bar was an open and obvious danger upon which liability against the manufacturer may not be premised.

The trial court erred in failing to grant Bryant-Poff's motion for judgment on the evidence.

Judgment reversed.

NEAL and ROBERTSON, JJ., concur.

IN THE

COURT OF APPEALS OF INDIANA

NO. 1-382A71

BRYANT-POFF, INC.,	)	Appeal from the
	)	Morgan Circuit
Appellant	)	Court
(Defendant Below),	)	
	)	
vs.	)	
	)	
DENNIS HAHN,	)	
	)	The Honorable
Appellee	)	John E. Sedwick,
(Plaintiff Below).	)	Jr., Judge

APPELLEE'S PETITION FOR REHEARING

Appellee, Dennis Hahn ("Dennis"), respectfully petitions the Court to grant a rehearing in the above-entitled cause for the following reasons:

1. The Court erred in misapplying its duty of appellate review by weighing the evidence and substituting its view of the evidence for that of the jury. The Court also erred in holding that the lack of a guard was the only defect when, in fact,

there is substantial evidence of other latent and hidden defects that made the product unreasonably dangerous. The Court failed to follow the law that allows it to look to the evidence most favorable to the Appellee to determine if there was sufficient evidence to support the jury's verdict.

2. In holding that a product, at one and the same time, could be both unreasonably dangerous and also present a danger that was open and obvious. This holding is erroneous since the jury was properly instructed on the definition of unreasonably dangerous under the strict liability theory as required by Bemis and it did in fact find the machinery to be unreasonably dangerous.

"COURT'S FINAL INSTRUCTION NO. 9

A 'defective condition' is a condition which existed at the time the product left the defendant's hands, and is not contemplated by the plaintiff and which will be unreasonably dangerous to him.

> 'Unreasonably dangerous to the user' means that the product must be dangerous to an extent beyond that which would be contemplated by the ordinary user with the ordinary knowledge common to the foreseeable class of users as to the characteristics of the product.
>
> ****"

3. In holding that "defect" and "danger" are synonymous terms. Here, the Court of Appeals reasoned that the lack of a guard was a defect readily observable hence there could be no recovery. " **** we do not read Bemis, Shanks, and Coffman to permit liability to attach when that defect should have been obvious to the party injured."

What the Court of Appeals failed to comprehend was that the danger was that the machinery would be started at one of the defective remote control stations by an operator who knew Dennis to be working near the chain and sprocket. This danger under all the circumstances of the case was not

open and obvious and presented a question for the jury under proper instructions.

4. The Court erred in deciding that the question of an open and obvious danger under the facts of this case was a question for the Court rather than the jury when more than one intelligent conclusion could be reached from the facts of the case. (See Dudley Sports Co. v. Schmitt, (1972) ___ Ind.App.___, 279 N.E.2d 271, 274; Kroger v. Haun, (1978, 2nd Dist.) 379 N.E.2d 1004. See also, Judge Hoffman's most recent Liberty Mutual Ins. Co. v. Rich Ladder Co., et al, (1982) 441 N.E.2d 996, where he wrote, "whether the screws . . . constituted an unreasonably dangerous hidden defect in design was therefore an issue which was properly presented for JURY DETERMINATION." (our emphasis), and also the case of J.I. Case v. Sandefur, (1964), 245 Ind. 213, 197 N.E.2d 519, where it said, "THIS AGAIN IS A QUESTION OF FACT,

NAMELY, WAS THERE A CONCEALED DEFECT OR HIDDEN DANGER TO A USER?", 197 N.E.2d at 523.)

5. This Court erroneously decided a new question of law. This Court states that the cases of Bemis Co., Inc. v. Rubush, (1982) ___Ind.___, 427 N.E.2d 1008; Shanks v. A.F.E. Industries, Inc., (1981) ___Ind. ___, 416 N.E.2d 833; Coffman v. Austgen's Electric, Inc., (1982) ___Ind.App.___, 437 N.E.2d 1003, do not permit liability to attach when the lack of a guard may be one of the product's defects. This Court ignores the other defects present in the machinery here involved, i.e., failure to have a code required disconnecting device at the remote operator's stations, Bryant-Poff's failure to properly instruct on power deactivation when undertaking maintenance procedures and the presence of a chain that would unexpectedly snap upward when the motor was started and thereby

draw the arm of a person into the nip point of the sprocket even though the person was not initially touching the device. The presence or absence of these other dangers and whether they were patent, latent or readily discernible presented fact questions to be decided by a jury under proper instructions. Bemis, Shanks and Coffman do not hold otherwise.

6. This Court overlooked and contravened the ruling precedent found in the case of Dudley Sports Company, Inc. v. Schmitt, supra, which holds that the lack of a guard does not in and of itself mean that a danger is open and obvious as a matter of law. See also Judge Hoffman's Liberty Mutual Ins. Co. v. Rich Ladder Co., supra.

7. This case purports to follow Bemis, Shanks and Coffman in holding that as a matter of law, if a machine is unguarded he cannot recover even if other

defects are present and unknown to the user and the manufacturer has failed to properly instruct in the use of his machine. If these cases so hold (and Dennis does not agree that they do so hold), they are in need of clarification as to how and under what circumstances a Court may make a determination as a matter of law when a given defect presents a danger which should be obvious and when a defect presents a danger which is not obvious and just how and what standards (subjective or objective) apply. Therefore, these decisions are in need of clarification, modification or correction if, as here, they can be read to hold that in all cases regardless of the surrounding facts, the "open and obvious danger" rule is a matter of law for the Court rather than a jury.

8. The cases of Shanks and Coffman are clearly distinguishable and not authorities that compelled the Court of Appeals

to hold in this case that all of the dangers confronting Dennis on the day in question were open and obvious as a matter of law.

9. Assuming the open and obvious danger rule is a question of law to be determined by the Court, the trial court must have determined (if the question was before it) that all the product's dangers were not open and obvious and this Court failed to follow ruling Supreme Court precedence and contravened rulings of the Courts of Appeals in finding the trial court erred in overruling Bryant-Poff's motion for Judgment on the evidence when there was evidence before the trial court of probative value upon each of the elements of negligence AND strict liability necessary for a prima facie case.

Respectfully submitted,

CLINE, KING, BECK,
HARRISON & RUNNELS

By: /s/Patrick W. Harrison
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I, Patrick W. Harrison, do hereby certify that a copy of the above and foregoing Appellee's Petition for Rehearing was mailed, with sufficient postage affixed, to Mr. David E. Lawson of Howard, Lawson & Lowry, 110 S. Washington, St., Danville, IN 46122 this the 10th day January, 1983.

/s/Patrick W. Harrison
Patrick W. Harrison

(Filed January 10, 1983)

IN THE

COURT OF APPEALS OF INDIANA

BRYANT-POFF, INC., Appellant (Defendant below),	)	
v.	)	Court of Appeals
DENNIS HAHN, Appellee (Plaintiff below).	)	No. 1-382 A 71

DENIAL OF APPELLEE'S PETITION FOR REHEARING

You are hereby notified that the Court of Appeals has on this day: Appellee petition for rehearing denied. Buchanan, C.J. Appellants motion to deny Appellee's motion for rehearing denied. Buchanan, C.J. Appellants motion to dismiss Appellee's motion for rehearing denied. Buchanan, C.J.

Please acknowlege receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 27th day of January, 1983.

/s/Marjorie H. O'Laughlin
Clerk Supreme Court and
Court of Appeals

IN THE

SUPREME COURT OF INDIANA

NO._____

BRYANT-POFF, INC.,	)	Appeal from the
	)	Morgan Circuit
Appellant	)	Court
(Defendant Below),	)	
	)	
vs.	)	
	)	
DENNIS HAHN,	)	
	)	The Honorable
Appellee	)	John E. Sedwick,
(Plaintiff Below).	)	Jr., Judge

PETITION TO TRANSFER

1. The Court of Appeals decided this case in a Memorandum decision on the 22nd day of December, 1982, which was ordered published on January 27, 1983.

2. The opinion of the Court of Appeals was against the plaintiff-appellee, Dennis Hahn.

3. A Petition for Rehearing was filed with the Court of Appeals in time and the rehearing was denied on the 27th

day of January, 1983.

4. The opinion of the Court of Appeals is in error in its application of Bemis Co., Inc. v. Rubush, (1982) ___Ind. ___, 427 N.E.2d 1058 on the open and obvious danger rule and in its method of appellate review together with it contravening ruling precedents of the Supreme Court and in conflict with other decisions of the Courts of Appeal and in deciding two new questions of law as all set out immediately following.

5. The opinion contravenes ruling precedent of the Supreme Court in the following areas:

a) On the open and obvious rule it contravenes Bemis Co., Inc. v. Rubush, (1982) ___Ind. ___, 427 N.E.2d 1058, J.I. Case v. Sandefur, (1964) 245 Ind. 213, 197 N.E.2d 519 when the Court of Appeals found that

whether a defect was open and obvious was a question of law when Bemis and Sandefur both hold it is a question of fact unless admitted as in Bemis.

b) The Court of Appeals ruled that there was sufficient evidence for the jury to find the product to be unreasonably dangerous, but in contravention of the ruling precedents of Bemis, supra, stated that although unreasonably dangerous, if the defect should have been obvious to the user, he could not recover. A defect which is unreasonably dangerous cannot by definition be also open and obvious and Bemis so held.

c) The Court of Appeals' ruling contravenes Supreme Court precedents, namely the cases of

Dent v. Dent, (1961) 241 Ind. 606, 174 N.E.2d 336; Union Traction Co. of Ind. v. Gaunt, (1922) 193 Ind. 109, 135 N.E. 486; Indpls. Newspapers, Inc. v. Fields, (1970) ___Ind.___, 259 N.E.2d 651 when it held in weighing the evidence that the defect should have been obvious to a user when a jury properly instructed did not so find. The Court may only view the evidence most favorable to the appellee, Dennis.

d) With respect to the review by the Court of Appeals of a jury verdict in favor of the appellee and in reviewing the evidence to determine whether any error was made in refusal to grant a motion for judgment on the evidence, the Court of Appeals

contravened the ruling precedents set forth by this Court in Miller v. Griesel, (1974) ___ Ind.___, 308 N.E.2d 701; Shanks v. A.F.E. Industries, (1981) ___Ind.___, 416 N.E.2d 833 and J.I. Case v. Sandefur, (1964) 245 Ind. 213, 197 N.E.2d 519.

2. The opinion of the Court of Appeals conflicts with prior opinions of the Court of Appeals.

a) On the question of open and obvious as a question of law or fact and specifically the cases of Dudley Sports Co. v. Schmitt, (1982) 279 N.E.2d 266; Gilbert v. Stone City Co., (1976) 171 Ind. App. 418, 357 N.E.2d 738; Liberty Mutual Ins. Co. v. Rich Ladder Co., et al, (1982) ___Ind.App.___, 411 N.E.2d 9996; Meadowlark Farms, Inc. v. Warken, (1978) ___Ind.___, 376

N.E.2d 122. These cases all conclude that whether a defect is dangerous and whether that danger is so obvious as to preclude liability is a question of fact.

b) With respect to a motion for judgment on the evidence and appellate review of a jury verdict it has been held in Ortho Pharmaceutical Corp. v. Chapman, (1979) ___ Ind.App.___, 388 N.E.2d 541; Johnson v. Bender, (1977) 331 N.E. 2d 743, ___Ind.App.___; Senco Products, Inc. v. Riley, (1982) ___Ind.App.___, 434 N.E.2d 561; Dudley Sports Co. v. Schmitt, (1972) ___Ind.App.___, 279 N.E. 2d 271 that only if there is a lack of evidence on one of the elements necessary to establish a prima facia case may a directed verdict be granted or may a re-

viewing court reverse for failure of proof. This Court specifically holds that there was sufficient evidence to find the defect unreasonably dangerous, but that if a defect should be obvious to a user regardless of whether the danger is unreasonable (i.e., beyond the contemplation of the user), that the user cannot recover. However, if in determining whether there is evidence to support an element required (defect), it may look only to the evidence most favorable and all inferences therefrom to the non-moving party. The Court found a defect yet because they found as a matter of law it should have been obvious, Dennis could not recover. This holding is clearly in conflict with the

law on judgments on the evidence and the appellate rules of review.

3. The opinion of the Court of Appeals erroneously decides two new questions of law.

a) The Court holds that whether a defect in a product should be obvious to a user is a question of law.

b) The Court holds that as a matter of law a product with a defect which makes it unreasonably dangerous may be so open and obvious that liability may not attach.

4. If the Bemis case may be interpreted (and Appellee does not so contend) to allow a Court ot hold that as a matter of law even if a defect makes the product unreasonably dangerous and this defect (not the danger) should be obvious to the user precludes recovery, then Bemis is in need of clarification, modification

or correction. No other case has ever stated that as a matter of law when there is a conflict or dispute as to the evidence or where the evidence can lead to more than one reasonable conclusion that the question of whether a danger caused by a defect is unreasonable is not a question for a jury. But, if Bemis so holds (and it does not since Mr. Rubush admitted the danger was open and obvious to all), it should be modified.

(Filed on or about February 15, 1983)

IN THE

SUPREME COURT OF INDIANA

BRYANT-POFF, INC., Appellant (Defendant below),	)	
v.	)	Court of Appeals No. 1-382 A 71
DENNIS HAHN, Appellee (Plaintiff below).	)	

DENIAL OF APPELLEE'S PETITION TO TRANSFER

You are hereby notified that the Supreme Court has on this day: Appellee's petition for transfer to the Supreme Court of Indiana is hereby denied. Givan, C.J. Hunter, J., dissents to the denial of transfer with opinion in which DeBruler, J., concurs. Issued the enclosed opinion.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 29th day of September, 1983.

/s/Marjorie H. O'Laughlin
Clerk Supreme Court and
Court of Appeals

IN THE

SUPREME COURT OF INDIANA

BRYANT-POFF, Inc., Appellant (Defendant below),	)	
v.	)	Court of Appeals No. 1-382 A 71
DENNIS HAHN, Appellee (Plaintiff below).	)	

APPEAL FROM THE MORGAN CIRCUIT COURT
THE HONORABLE JOHN E. SEDWICK, JR., JUDGE

HUNTER, J. -- Dissenting to denial of transfer.

I respectfully dissent to the denial of plaintiff's petition to transfer from the Court of Appeals' decision in Bryant-Poff, Inc. v. Hahn, No. 1-382 A 71 (Ind. App. Dec. 22, 1982). Plaintiff, Dennis Hahn, seeks review of the Court of Appeals' reversal of a judgment in favor of plaintiff. Hahn sued defendant Bryant-Poff on the joint theories of negligence and

strict liability under § 402 A of the Restatement (Second) of Torts and was awarded damages of $663,000. On appeal, the court reversed the judgment and held as a matter of law that the danger was open and obvious, thus precluding liability against the manufacturer. For the following reasons, I would grant transfer, vacate the Court of Appeals' decision, and affirm the trial court's judgment.

Bryant-Poff, Inc., an Indiana corporation, designs, manufactures, and installs large farm equipment, including grain elevators. In 1966, Bryant-Poff installed two grain elevator legs, which it also had designed, at the Decatur County Farm Bureau Cooperative in Letts, Indiana. The elevator legs were used as vertical conveyors to transport grain from the ground to storage areas. An electric motor with a chain and sprocket device located at the top of the elevator leg powered the conveyor. The

chain and sprocket mechanism was approximately four feet above a maintenance platform, which was ninety feet above ground.

On June 21, 1977, Hahn, who was eighteen at the time and an employee of the Farm Bureau, was doing maintenance work on one of the grain elevator legs. After working for about an hour on the maintenance platform, Hahn reached his hand between the chain and sprocket to paint a rust spot. At that time, the manager activated the chain and sprocket device from the ground floor operator's station. Hahn's right arm was pulled into the sprocket and crushed. The arm eventually had to be amputated below the elbow.

Two separate electrical cut-off devices had been provided to prevent electricity from reaching the motor that operated the chain and sprocket. One was a fuse disconnection located in the power room in the basement; the other cut-off

device was at the maintenance platform and could be engaged from the fourth rung of the ladder leading to the platform. However, this mechanism was inoperable at the time of the injury. Furthermore, Hahn had not been instructed on the operation of the cut-off devices and had not been on the platform prior to the day of his injury. There was testimony that the Bryant-Poff mechanism violated industry standards because no barrier guard was installed on the chain and sprocket. Based on this evidence, the Court of Appeals stated: "[T]here was evidence from which the jury could have concluded that the unguarded chain and sprocket mechanism was unreasonably dangerous in light of industry regulations and standards at the time it was designed and manufactured . . . ." Bryant-Poff, Inc., No. 1-382 A 71 at 4. However, the court also found that the trial court erred by not granting Bryant-

Poff's motion for judgment on the evidence because the "defect should have been obvious to the party injured." Id.

As Hahn points out, it is inconsistent under Indiana law to find something unreasonably dangerous but also open and obvious. In Bemis Co., Inc. v. Rubush, (1981) ___ Ind.___, 427 N.E.2d 1058, this Court held that a product must be "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics" in order to be actionable under Section 402 A. Id. at 1061. The majority then determined that if a danger is open and obvious to the person using it, the product is not unreasonably dangerous. Id. Although I still believe that the better approach is to treat an open and obvious danger as but one factor when determining whether a product is unreasonably danger-

ous, Bemis, 427 N.E.2d at 1070 (Hunter, J., dissenting), the Court of Appeals' decision is erroneous under either approach. If the openness and obviousness of a danger is but one factor, it cannot preclude liability if there is other sufficient evidence that the product was unreasonably dangerous. Under the Bemis rationale, the Court of Appeals' decision is inherently inconsistent because a product cannot be unreasonably dangerous if it had an open and obvious danger.

Furthermore, the question of whether a product is unreasonably dangerous or, in Indiana, open and obvious, is normally for the jury. In Bemis, the Court stated that the trial court erred in not instructing the jury on the open and obvious rule and in failing to define unreasonably dangerous. Id. at 1064. In Hoffman v. E. W. Bliss Co., (1983) ___Ind.___, 448 N.E.2d 277, 285, this Court stated: "A careful examination

of the evidence in each case is necessary to determine whether the danger in the product is truly and entirely open and obvious." We refused to hold as a matter of law that an overhead ram on a metal punch press was an open and obvious danger because there was conflicting evidence on whether the machine had an internal defect. Also, because the jury could have believed a hidden defect existed, and the defendant had failed to warn of this defect, we refused to find the danger open and obvious; instead, we left it for the jury to determine whether the product in Hoffman had an open and obvious danger. Id. at 285. See also J. I. Case Company v. Sandefur, (1964) 245 Ind. 213, 197 N.E.2d 519 (whether a concealed defect or sudden danger exists is a question of fact). In the present case, however, the Court of Appeals held that the trial court should have granted defendant's motion for judgment on the evidence, thus

finding the danger open and obvious as a matter of law.

Judgment on the evidence under Indiana Trial Rule 50 is appropriate only when there is no substantive evidence or reasonable inferences to be derived therefrom to support an essential element of the claim. There must be a complete failure of proof. Shanks v. A.F.E. Industries, Inc., (1981) ___Ind.___, 416 N.E.2d 833, 834.

The trial court may not weigh the evidence when entering judgment on the evidence subsequent to a jury verdict, but may consider only the evidence and inferences favorable to the non-moving party. Huff v. Travelers Indemnity Co., (1977) 266 Ind. 414, 363 N.E.2d 985; Elsperman v. Plump, (1983) ___Ind.App.___, 446 N.E.2d 1027; Ortho Pharmaceutical Corp. v. Chapman, (1979) 180 Ind.App. 33, 388 N.E.2d 541. On appeal, a reviewing court is bound by this same standard.

Elsperman, 446 N.E.2d at 1030; Craven v. Niagara Machine and Tool Works, Inc., (1981) ___Ind.App.___, 417 N.E.2d 1165, affirmed on rehearing 425 N.E.2d 654. The court must determine whether there was sufficient evidence to support each element of the claim. Huff, 266 Ind. at 422, 363 N.E.2d at 991. Despite the fact that there may be conflicting evidence, judgment on the evidence is improper so long as there is relevant evidence to support the claim. Id. Only when there is a complete absence of proof, which makes the trial court's denial of a motion for judgment on the evidence clearly erroneous, will the judgment be disturbed. Id.; Elsperman, 446 N.E.2d at 1030.

To recover on a products liability claim, a plaintiff must prove that a manufacturer sold a defective product, that the product reached the user without substantial change in the product's condition, and that

the product caused the plaintiff's injury. Ayr-way Stores, Inc. v. Chitwood, (1973) 261 Ind. 86, 93, 300 N.E.2d 335, 340. See also Ortho Pharmaceutical, 180 Ind.App. at 37-38, 388 N.E.2d at 545; § 402A Restatement (Second) of Torts (1965). A manufacturer is liable for a defective product when the product is unreasonably dangerous to the ultimate consumer due to manufacturing flaws, defective design, or inadequate warnings or instructions concerning the dangers associated with the product's use. Lantis v. Astec Industries, Inc., (7th Cir. 1981) 648 F.2d 1118 (applying Indiana law); Hoffman, 448 N.E.2d at 281. See § 402A supra, Comments g & h. A product is unreasonably dangerous when the danger is beyond the contemplation of the ordinary consumer, who possesses ordinary knowledge common to the community of the product's characteristics. § 402A, supra, Comment i. Consumers expect a manufacturer to make a

product as it was designed, without manufacturing flaws. Similarly, the ordinary consumer contemplates that a manufacturer will design a product that is as safe as reasonably possible without impairing the product's functional capacities and at a reasonable cost. Thus, a manufacturer weighs the cost of safety devices against the possibility and gravity of harm if the safety precautions are not taken. 2 Harper & James, The Law of Torts § 28.4 (1956). Because consumers realize that not all dangers may be avoided, however, they also contemplate that manufacturers will supply adequate warnings and instructions advising the user of latent defects and possible dangers. Ortho Pharmaceutical, 180 Ind.App. at 38-39, 388 N.E.2d at 545; § 402A supra, Comment k. A manufacturer's failure to meet any one of these consumer expectations renders him liable for the defective product when the defect causes the injury.

In the present case, Bryant-Poff argues that Hahn failed to prove that the product was defectively designed or manufactured because the elevator leg's chain and sprocket device performed exactly as it was meant to, and the fuse disconnections would have prevented the injury if the cut-offs had been used. Bryant-Poff also contends that the question whether a guard should have been placed over the chain and sprocket device is irrelevant because Hahn would have had to remove the guard to paint the rusty area. However, the trial court found there was enough evidence to support the elements of Hahn's claim, and, on review, the Court of Appeals admitted there was sufficient evidence to support a finding that the product was unreasonably dangerous. When our standard of review for a motion under Trial Rule 50 is applied, it is obvious the evidence was sufficient to justify submitting the case to the jury.

The evidence most favorable to Hahn indicated that Bryant-Poff had never supplied any instructions or warnings to the Farm Bureau concerning the fuse disconnections. Expert testimony was presented that the absence of a guard over the chain and sprocket device violated industry standards and was unreasonably dangerous. There was additional evidence that Hahn had not worked on the platform before and was unfamiliar with the operation of the elevator leg. Nor had he ever been instructed on where the electrical cut-off devices were located or how to lock out the power to the elevator leg's motor. Additional testimony revealed that the chain was slack when Hahn reached in to paint behind the mechanism, that the chain and sprocket were not in motion while Hahn was on the platform, and that he did not perceive the mechanism as dangerous when he reached in to paint the rust spot. Only

when the mechanism was activated did the danger become open and obvious. When activated, the chain was whipped taut and it was this movement that pulled Hahn's arm into the chain and sprocket nip point.

A manufacturer has a duty to make a product as safe as reasonably possible for its foreseeable use. Hoffman, 448 N.E.2d at 287 (Hunter, J., concurring in result). If it is feasible for a manufacturer to provide a safety device, it should be a question of fact for the jury to determine whether the absence of the safety device was unreasonably dangerous. 2 Harper & James, The Law of Torts § 28.5 p. 1543 (1956). Hahn presented evidence from which the jury could have found that the absence of a guard violated industry standards, that it was feasible to provide a guard, and that the chain and sprocket device was, therefore, unreasonably dangerous. Additionally, the jury may have reasonably inferred that if

Hahn had to remove a guard, he would have been alerted to the need to disconnect the power before working around the chain and sprocket.

Moreover, a product may be defective because of inadequate warnings or instructions by the manufacturer. Hoffman, 448 N.E. 2d at 281. Bryant-Poff contends that no warning was necessary because the chain sprocket device was an open and obvious danger. Although it is undisputed that when moving the chain and sprocket presented an open and obvious danger, the facts that the power was not disconnected and that the mechanism could be activated from the ground while a worker was on the platform were not open and obvious dangers. Bryant-Poff provided no warnings on the maintenance platform concerning the need to disconnect the power. Nor was there any warning light to indicate that the power was still on or any instructions on how to

disconnect the power. Whether this lack of warning created an unreasonable danger, or was in fact unnecessary, was for the jury to decide once they were instructed on the open and obvious rule and the definition of unreasonably dangerous.

To hold that the danger from the unguarded chain and sprocket, while not in motion, was open and obvious, as a matter of law, creates the very situation those critics of the open and obvious rule have predicted. That is, a manufacturer may avoid liability by purposefully leaving off safety devices in order to make a danger more obvious. See Bemis, 427 N.E.2d at 1069 (Hunter, J., dissenting); Bexiga v. Havir Mfg. Corp., (1972) 60 N.J. 402, 412, 290 A. 2d 281, 286; Palmer v. Massey-Ferguson, Inc., (1970) 3 Wash.App. 508, 517, 476 P.2d 713, 719. Leibman, Products Liability, 1982 Survey of Recent Developments in Indiana Law, 16 Ind. L. Rev. 241, 261 (1983).

This result ignores the policy underlying Section 402A, which is that the manufacturer has the primary responsibility for making a product reasonably safe for its intended and foreseeable use. Hoffman, 448 N.E.2d at 287 (Hunter, J., concurring in result); Micallef v. Miehle Co., (1976) 39 N.Y.2d 376, 384 N.Y.S.2d 115, 348 N.E.2d 571.

Bryant-Poff also argues that it was the employer's duty to warn Hahn about the chain and sprocket mechanism and instruct him on the cut-offs. This argument is clearly not Indiana law. A manufacturer has a duty to warn of latent defects in order to make a product as safe as reasonably possible. Bemis, 427 N.E.2d at 1061; Nissen Trampoline Co. v. Terre Haute First Nat'l Bank, (1976) Ind.App., 332 N.E.2d 820, rev'd on other grounds, (1976) 265 Ind. 457, 358 N.E.2d 974. This duty is not delegable. Hoffman, 448 N.E.2d at 282-83.

See also J. I. Case Company v. Sandefur, 245 Ind. at 221-22, 197 N.E.2d at 522-23. Furthermore, a "manufacturer has a duty to warn of potential dangers associated with the use of a product that is otherwise free from latent design or manufacturing defects" if he has some control over the way an employer incorporates the product into his operation. Hoffman, 427 N.E.2d at 283. As was the injury producing product in Hoffman, the grain elevator leg in the present case was not installed as a component part or in a multi-faceted operation. Compare Shanks v. A.F.E. Industries, Inc., 416 N.E.2d 833. Rather, Bryant-Poff had constructive knowledge of the basic operation of the grain elevator leg at the Farm Bureau and the location of the cut-offs for the chain and sprocket mechanism. Consequently, Bryant-Poff, as the designer and manufacturer of the product, had an undelegable duty to warn of both the latent defects and/or

possible dangers associated with the product. Thus, the jury may have found that Bryant-Poff was liable based on inadequate warnings.

Because there was evidence from which the jury could have concluded that Hahn's injury was a result of a defectively designed product or that Bryant-Poff had failed to provide adequate warnings or instructions, the trial court was justified in submitting the case to the jury. Consequently, to have granted Bryant-Poff's motion for judgment on the evidence would have been error. The Court of Appeals erroneously applied Bemis and Shanks to the present case in holding that the danger presented here was open and obvious as a matter of law. The trial court did not err in letting the jury weigh all of the evidence to determine whether the danger presented to Hahn by the nonmoving chain and sprocket was "truly and entirely open

and obvious." Hoffman, 448 N.E.2d at 285.

For all of the foregoing reasons, I dissent to the denial of transfer.

DeBRULER, J., CONCURS.

(Filed September 29, 1983)

IN THE

SUPREME COURT OF INDIANA

NO._____

COURT OF APPEALS NO. 1-382A71

BRYANT-POFF, INC.,	)	Appeal from
	)	Morgan Circuit
Appellant	)	Court
(Defendant Below),	)	
	)	
vs.	)	
	)	
DENNIS HAHN,	)	
	)	The Honorable
Appellee	)	John E. Sedwick,
(Petitioner Below).	)	Jr., Judge

APPELLEE'S PETITION FOR REHEARING

Appellee, Dennis Hahn, respectfully petitions the Court to grant a rehearing in the above-entitled cause for the reasons stated in the Dissenting Opinion attached hereto.

Also, every person not only in the State of Indiana but in the United States is entitled to equal protection under the laws. Indiana has long held that Courts

of Appeals are not allowed to weigh evidence in determining whether a directed verdict should or should not be granted. In this case the Court of Appeals found there was ample evidence from which the jury could have found the product to be unreasonably dangerous, that is dangerous beyond the understanding of Dennis Hahn. Thus the product could not have been under those facts open and obvious as a matter of law and the evidence was sufficient to allow the case to go to the jury as the trial court allowed. To allow the Court of Appeals to weigh the evidence is a violation of the equal protection clause to the Indiana and United States Constitution.

It should also be pointed out that as Justice Hunter and DeBruler state in the Dissenting Opinion to the denial of transfer, the Indiana cases hold that whether a product is open and obvious is a question of fact. It should also be pointed out

that the Hoffman v. E. W. Bliss case appears to apply the rule of open and obviousness unequally. In order to draw any factual distinctions between the Hoffman case and this case so as to allow open and obviousness as a matter of law in this case and not to allow it in the Hoffman case is not only illogical, not available, but is a clear application of the same law in a disproportionate and unequal manner. The Hoffman decision was stated by Chief Justice Givan at oral argument to be based upon the fact that the Hoffman machine may have malfunctioned. The evidence in the Hoffman case was that far less than one percent of the time could the machine have even possibly malfunctioned and that the likelihood of any malfunction being far less than one percent would negate any fact or conclusion that this Court allows such speculation from tremendously remote possibilities to apply. Judge Hoffman's

son placed his hand in the so-called danger zone when the machine was not working although it was turned on and he was familiar with it. Dennis Hahn placed his hand in the danger zone of this machine where he was injured when it was not on and when he did not understand how it worked or that it could even be activated. The danger to Hoffman was more obvious than was the danger to Hahn.

It is submitted that Dennis Hahn did not receive the equal protection as to the application of the laws of the State of Indiana since the court in Hoffman stated that in the case of open and obvious questions that each circumstance must be presented to a jury to determine whether the danger was clearly and entirely open and obvious.

CLINE, KING, BECK,
HARRISON & RUNNELS

By/s/Patrick W. Harrison
Patrick W. Harrison
Attorneys for Appellee

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I, Patrick W. Harrison, do hereby certify that a copy of the above and foregoing Appellee's Petition for Rehearing was mailed, with sufficient postage affixed, to David E. Lawson of Howard, Lawson & Lowry, 110 S. Washington St., Danville, IN 46122 this the 18th day of October, 1983.

/s/Patrick W. Harrison
Patrick W. Harrison

(Filed October 18, 1983)

IN THE

SUPREME COURT OF INDIANA

BRYANT-POFF, INC.,	)	
	)	
Appellant	)	
(Defendant below),	)	
	)	
v.	)	Court of Appeals
	)	No. 1-382 A 71
DENNIS HAHN,	)	
	)	
Appellee	)	
(Plaintiff below).	)	

DENIAL OF APPELLEE'S PETITION FOR REHEARING

You are hereby notified that the Supreme Court has on this day: Appellee's (Dennis Hahn) petition for rehearing is hereby dismissed pursuant to Appellate Rule 11 (B)(8). Hunter, A.C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 24th day of October, 1983.

/s/Marjorie H. O'Laughlin
Clerk Supreme Court and
Court of Appeals

IN THE

SUPREME COURT OF INDIANA

BRYANT-POFF, INC., Appellant (Defendant below),	)	
v.	)	Court of Appeals No. 1-382 A 71
DENNIS HAHN, Appellee (Plaintiff below).	)	

NOTICE TO APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

TO: (1) CLERK OF THE SUPREME COURT OF INDIANA, 217 STATE HOUSE, INDIANAPOLIS, IN 46204;

(2) DAVID E. LAWSON, Attorney of Record for Bryant-Poff, Inc., 110 SOUTH WASHINGTON STREET, DANVILLE, IN 46122.

Pursuant to Rule 10 of the Supreme Court of the United States of America you and each of you are hereby notified that an appeal of this case and matter is being filed with the Clerk of the Court of the Supreme Court of the United States on or about December 27, 1983; you are further advised as follows:

1. Party taking appeal: Dennis Hahn, Plaintiff before the trial court, Appellee before the Supreme Court of Indiana and before the Court of Appeals of Indiana, First District;

2. Judgment and decision appealed from: Dennis Hahn is appealing the Indiana Court of Appeals opinion of Bryant-Poff, Inc. v. Hahn, ___Ind.App.___, 454 N.E.2d 1223, 1223-1225, (1982), for which transfer was denied by the Supreme Court of Indiana on September 29, 1983, Justice Hunter dissenting and Justice DeBruler concurring with Justice Hunter's dissent, ___Ind.___, 453 N.E.2d 1171, (1983).

3. Statute or statutes under which the appeal to the Supreme Court of the United States is taken:

A. Fourteenth Amendment (§1) to the Constitution of the United States (privileges and immunities; equal protection; due process).

CLINE, KING, BECK,
HARRISON & RUNNELS

By: /s/Patrick W. Harrison
Patrick W. Harrison,
Attorney of Record
for the Appellee-
Petitioner

CLINE, KING, BECK,
HARRISON & RUNNELS
1015 Third Street
Post Office Box 250
Columbus, IN 47202-0250
Tel: (812) 372-8461

(Filed December 21, 1983)

IN THE

SUPREME COURT OF INDIANA

BRYANT-POFF, INC., Appellant (Defendant below),	)	
v.	)	Court of Appeals No. 1-382 A 71
DENNIS HAHN, Appellee (Plaintiff below).	)	

VERIFIED CERTIFICATE AND PROOF OF SERVICE

This is to certify that on the 21st day of December, 1983, I forwarded the attached Notice of Appeal to the Supreme Court of the United States to David E. Lawson, Attorney of record for Bryant-Poff, Inc., 110 South Washington Street, Danville, IN 46122, by certified United States Mail, return receipt requested.

/s/Patrick W. Harrison
Patrick W. Harrison

STATE OF INDIANA)
) SS:
COUNTY OF BARTHOLOMEW)

Subscribed and sworn to before me, a Notary Public, in and for said County and State, on this the 21st day of December, 1983.

My Commission Expires:

February 16, 1986

/s/Cathy J. Handly
Cathy J. Handly, Notary Public, Residing in Johnson County, IN

(Filed December 21, 1983)

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

DENNIS HAHN,

Petitioner,

v.

BRYANT-POFF, INC.,

Respondent.

AFFIDAVIT

The undersigned, being duly sworn upon his oath, says that:

1. I am Kent W. Hoffman and have personal knowledge of the facts contained in this affidavit.

2. I was the plaintiff-appellant, Kent W. Hoffman, in the cause of Hoffman v. E.W. Bliss Co., ___Ind.___, 448 N.E.2d 277, (1983).

4. I, Kent W. Hoffman, am the son of the Honorable George B. Hoffman, Jr., Judge of the Indiana Court of Appeals, Third District.

Further affiant saith not.

Kent W. Hoffman

STATE OF INDIANA)
) SS:
COUNTY OF HAMILTON)

Subscribed and sworn to before me, a Notary Public, in and for said County and State, on this the 21 day of December, 1983.

My Commission Expires:

June 28, 1985

Julie Deckard Weiler,
Notary Public, Residing
in Bartholomew Co., IN

SUPREME COURT OF INDIANA

Kent William HOFFMAN, et al., Appellants,

v.

E.W. BLISS COMPANY, et al., Appellees.

No. 882S320

Supreme Court of Indiana.

May 4, 1983.

GIVAN, Chief Justice.

This case was tried before a jury. A verdict was rendered in favor of all defendants. Appeal was taken by plaintiffs-appellants to the Court of Appeals. Pursuant to Ind.R.App.P. 15 (M), this appeal is transferred to this Court.

Plaintiffs Kent and Nancy Hoffman filed suit against various defendants as a result of injuries suffered by Kent Hoffman while he was working as an employee of Regency Electronics, Inc. The defendants orginally named in the suit were E.W. Bliss Company, Humston Machinery, Inc., and Rockford

Safety Equipment Company. Humston Machinery was dismissed from the action by agreement of the parties prior to trial. Rockford has been dismissed from the appeal by agreement of the parties during pendency of the appeal. Thus we decide the issues only as they apply to appellants Hoffman and appellee Bliss.

The record shows the following facts. Bliss, a Michigan corporation and a division of Gulf and Western Manufacturing Company, Inc., is a manufacturer of various types of metal punch presses for use in manufacturing operations. Sometime in 1965 a Bliss punch press was sold to Regency for use in the latter's machine shop in Indianapolis. Sometime thereafter Regency contracted with Rockford, a firm specializing in designing and distributing safety equipment for use on metal working machinery, for the purchase of a package of safety equipment on the Bliss press. Oliver

Daugherty, Regency's machine shop maintenance supervisor, testified he installed this package of safety equipment on the Bliss press.

The record shows metal punch presses of this type are used to punch out impressions in pieces of sheet metal. This particular press used a hydraulic power system to provide sixty (60) tons of pressure to punch the impressions in the pieces of sheet metal being processed. The basics of the mechanical operation of the press are as follows. The shape and size of the impression to be punched out are controlled by two dies. The functional area of the machine, the point of operation, is a large flat area. Two dies are attached to the press in the point of operation area. The lower die is stationary while the upper one is attached to the essential moving part of the machine, the ram. In a single operational cycle, the ram with die attached

descends to smash out the desired impression and then returns to its position above the point of operation. After several cycles have been run, the pieces cut out of the production material must be removed from the point of operation to prevent misalignment of the new production material to be put in the lower die.

The press in question is manufactured with the knowledge that more than one mode of operation is possible with the machine, depending on the needs of the purchaser of the press. Thus it can be equipped with different control devices with which it may be activated to cause one cycle of operation, i.e., one descent of the ram to occur. It was Rockford which supplied these control devices. One such device was a foot pedal which was housed in a metal box set on the floor under the press. The operator, who sits on a stool in front of the press, simply depresses the foot pedal to cause

one cycle of the operation to occur. The other means of activating the press is by simultaneous depression of two large buttons, called palm buttons, located on either side of the press. The safety advantage of the use of the palm buttons is that the operator is required to have both hands away from the point of operation in order to activate the press for a cycle of operation. Additionally the press is equipped with devices called pullbacks. The pullbacks are a pair of long metal arms with extendable cables attached to the arms and running into the body of the press. At the end of the cables are harnesses or restraints that are to be attached to the operator's hands or wrists. When the operator uses the pullbacks and activates the press for a cycle of operation, the metal arms and cables operate in such a way as to force his hands away from the point of operation as the ram descends.

Whether the press is to be operated by the foot pedal or the palm buttons is controlled by means of keys set in a control box located on the right side of the press. Only by switching the pair of keys in the control box could the mode of operation of the press be changed; simultaneous operation of the press via the foot pedal and the palm buttons is impossible.

Additionally, Rockford included in its package of safety equipment and controls warning signs to be attached to the press. One such sign was attached to the control box located on the right side of the press and stated:

"WARNING

> This control is not intended for use without point of operation devices or guards. Adequate safety equipment must be provided for operator's protection. Metal fabricating machines are very dangerous . . . . Maximum safety should always be exercised to prevent accidents."

A yellow plastic sign approximately

four by six inches was introduced into evidence. Printed on it in large black letters was the following:

"CAUTION

Do not operate unless safety guards or devices are in place and adjusted properly."

The record shows this sign was not affixed to the press. John McAlister, Rockford's president, testified it was customary for Rockford to include this sign in the package of safety equipment with instructions to affix it to the front of the press. Oliver Daugherty testified he never saw a sign like this in the package of safety equipment.

Also included in the safety equipment package supplied by Rockford were various manuals and instruction booklets relative to installation of the equipment. These were also admitted into evidence.

The testimony taken at trial as to the precise manner in which the accident oc-

curred is conflicting on some points. Hoffman testified be began working at Regency in its machine shop on February 23, 1976. On March 4, 1976, the day of the accident, he was assigned to work on the Bliss press for the first time. He testified he was shown how to operate the press by Bernis Thompson, Regency's "lead man" in the machine shop, whose duty it was to generally instruct employees on proper operation of the equipment in the machine shop. Hoffman testified Thompson ran one or two pieces of production material through the press and that the total amount of instruction time he received was about five minutes. He testified the press was set up to operate by using the foot pedal and not the palm buttons. Hoffman testified he was not shown how to use either the palm buttons or the pullbacks. He testified he was not given any tools with which to remove scraps from the point of operation when it

was necessary to do so and that he removed scraps with his bare right hand. Hoffman further testified he found the press was operating improperly, in that it was often necessary to hit the foot pedal two or three times to get the ram to descend. He testified he told Thompson about this problem. Thompson neither verified nor denied that Hoffman told him of this problem.

Hoffman testified that at about 2:30 P.M. that afternoon he had just punched out an impression in a piece of production material and that, as was necessary every few cycles, he reached into the point of operation beneath the ram to remove the scraps that had collected there. While his right hand was in that area and without warning or activation by him, the ram suddenly descended crushing his fingers. Most of his index finger and all of the next two fingers of his right hand were severed and his little finger was partially crushed.

Hoffman testified that when the ram descended his foot was completely out of the control box housing the foot pedal.

Bernis Thompson testified he always told an employee operating the press for the first time of the use of the safety equipment incorporated into the press and that he remembered so instructing Hoffman. He admitted, however, on cross-examination, he could not recall specifically doing so with regard to Hoffman. He also testified he never had experienced any problem with the activation of cycles of operation using the foot pedal.

Terry Weddle, a Regency employee who on the date of the accident was working at the work station in the machine shop next to Hoffman, testified he was looking directly at Hoffman at the moment the ram descended on his hand. He stated at that moment Hoffman's foot was nowhere near the foot pedal.

Much testimony was taken regarding the cause of the descent of the ram. Hoffman's theory as to this cause was that the press "double tripped." Testimony showed a double trip of a press occurs when following a normal cycle of the press a second cycle occurs without warning and without any operator initiation. Raymond Brach, a Notre Dame associate professor of engineering called as an expert witness by Hoffman, testified presses of this type did sometimes double trip and explained why such action occurs. However, he admitted he inspected the press after the accident and found no evidence a double trip could have occurred. Joseph Schwalje, a professor of engineering at Pratt Institute in New York, was called as an expert witness by Bliss. He testified a single cycle, i.e., a descent and return of the ram, took place over an elapsed time of six-tenths of a second. He also testified when a true

double trip occurred, the second uninitiated descent of the ram occurred immediately after the ram returned to the top of the press from the prior operator initiated cycle. Schwalfe testified thus the elapsed time from the beginning of the first initiated descent of the ram to the middle of the second and uninitiated descent was nine-tenths of a second. Professor Schwalje testified in his opinion it was almost impossible for an operator to be injured by a true double trip of his press because he would have too short a time, six-tenths of a second, in which to get his hand into the point of operation such that it could be struck by a second uninitiated ram descent. Schwalje further testified that based on his inspection of the press it was incapable of double tripping due to the absence of any defect in the only parts of the operating mechanism of the press that would have to be struc-

turally defective for a double trip to occur. Schwalje conceded that due to "an act of God or something" the press could go into an uninitiated cycle that would not be per se a true double trip because the uninitiated cycle would not follow the initiated cycle instantaneously.

Witnesses Weddle and Larry Gibson, another Regency machine shop employee, both testified they were aware of the press having a tendency to double trip. The nature of their testimony does not make it clear whether they were speaking of a true double trip, wherein the uninitiated cycle occurs immediately after the initiated cycle, or whether they were speaking of an uninitiated cycle that follows sometime after the initiated cycle. Weddle testified the press had malfunctioned in this way "once every thirty to fifty parts" while he was operating it. Gibson testified this malfunction had never occurred while he

was operating the press but that he had seen it happen while other employees were operating the press.

Bernis Thompson testified that he never knew of the press to double trip and also that he never knew the press to fail to cycle upon a single depression of the foot pedal. Charlie Kendall, Regency's machine shop supervisor, also corroborated Thompson's testimony that the press had never double tripped and that he didn't recall any employees ever reporting any malfunctions of the press. Oliver Daugherty testified he ran the press through fifty to one hundred cycles immediately after the accident occurred and that it never double tripped, never spontaneously cycled without activation, never failed to cycle upon a single depression of the foot pedal, and that the pullbacks were in working order but also needed a slight adjustment to make them operative.

The Hoffmans' suit was brought on the authority of the case law of this jurisdiction recognizing liability of manufacturers and sellers of products for injuries caused by the placing of those products that are in a "defective condition unreasonably dangerous" in the stream of commerce. See, e.g., Bemis Company, Inc. v. Rubush, (1981) Ind., 427 N.E.2d 1058; Shanks v. A.F.E. Industries, Inc., (1981) Ind., 416 N.E.2d 833; Ayr-Way Stores v. Chitwood, (1973) 261 Ind. 86, 300 N.E.2d 335. This liability is premised on § 402A of the Restatement (Second) of Torts (1965), which reads in relevant part:

> "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property . . . ."

Moreover, the Indiana Legislature has codified the basic principles of § 402A

products liability into law in I.C. § 34-4-20A-1 et seq. [Burns 1982 Supp.].

It has also been observed the so-called "strict liability" theory of products liability does not mean the manufacturer of a product is absolutely liable for any injuries suffered by the user of the product. Conder v. Hull Lift Truck, Inc., (1982) Ind., 435 N.E.2d 10; Bemis, supra; Shanks, supra; Ayr-Way Stores, supra. "[A] manufacturer or seller is not liable for every failure of its product which results in injury and is liable only if the product contains a defective condition rendering it unreasonably dangerous." Conder, supra, 435 N.E.2d at 17.

[1] Also, a recovery for a plaintiff in a products liability suit requires proof the product's defect was the proximate cause of his injury. Conder, supra; Bemis, supra.

[2] In order for the plaintiff to

recover, the defect can be that the product was defectively designed, defectively manufactured, or that the manufacturer failed to supply adequate warnings or instructions as to the dangers associated with its use. Lantis v. Astec Industries, Inc. (7th Cir. 1981), 648 F.2d 1118 (applying Indiana law); Burton v. L.O. Smith Foundry Products Company (7th Cir.1975), 529 F.2d 108 (applying Indiana law).

The only issue presented for our review is whether the trial court erred in giving Defendant's Final Instruction No. 8., which reads as follows:

> "The manufacturer of a press, such as the defendant E.W. Bliss Company, is entitled to assume that the company using its press will adequately safeguard the press for the operation for which it is being used and will instruct its employees in the operation of the press and the need to employ the safety devices provided.
>
> "If you find that the plaintiff was either inadequately instructed and/or failed to use available safety devices which was

> the proximate cause of his injury, then I instruct you that this would constitute a misuse of the equipment and be a complete defense to the allegations against E.W. Bliss Company."

Hoffman asserts this instruction misstates the law in two important respects. He first objects to that part of the first paragraph of the instruction stating "the defendant E.W. Bliss Company, is entitled to assume that the company using its press will adequately safeguard the press for the operation for which it is being used and will instruct its employees in the operation of the press . . . ." It is Hoffman's contention that this part of the instruction erroneously instructs the jury that where the manufacturer of a product sells his product to a second party employer who intends to use the product in a manufacturing type operation, the manufacturer is absolved of any duty to have manufactured or designed a safe product or to provide

any warnings calculated to reach the ultimate consumer or user of the product as to potential dangers or hazards associated with its use.

Bliss' response to this argument is that the first paragraph of this instruction must be read in conjunction with Plaintiff's Final Instruction No. 4, which states:

> "You are instructed that where warnings or instructions are required to make a product non-defective, it is the duty of the manufacturer to provide such warnings in a form that will reach the ultimate consumer and inform of the risk and inherent limits of the product. The duty to provide a nondefective product is nondelegable."

Bliss points out it is well-established that instructions are to be read as a whole and considered together. See, e.g., Deckard v. Adams, (1965) 246 Ind. 123, 203 N.E.2d 303; State v. Totty, (1981) Ind.App. 423 N.E.2d 637. Bliss argues if the two

instructions are read together they correctly state the law with respect to the first point Hoffman raises.

Certainly the manufacturer of a product may not design or manufacture a product with a latent flaw therein but escape liability for an injury attributable to the flaw simply by selling the product to an intermediate party, such as an employer who intends to use the product in a manufacturing operation. Such a result would suggest that the lack of privity between the manufacturer and the ultimate user of the product, the employee, bars recovery by the user for injuries proximately caused by the manufacturer's assembly or production of a flawed product. This Court specifically disapproved of such reasoning even before strict liability under § 402A became the law in Indiana. See, J.I. Case Company v. Sandefur, (1964) 245 Ind. 213, 197 N.E.2d 519. Moreover,

Comment b to § 402A states the manufacturer's liability for injuries caused by his sale of a product in "a defective condition unreasonably dangerous" lies even though "the user or consumer has not bought the product from or entered into any contractual relation with the seller." See also, Cornett v. Searjeant Metal Products, Inc., (1970) 147 Ind.App. 46, 258 N.E.2d 652.

Also, it has been held that though a manufacturer may defend in a § 402A action on grounds the user assumed or incurred a known risk in using the product, "[T]he contributory negligence of the plaintiff in failing to discover a defect in a product or failing to guard against the existence of a defect is not misuse of the product and is, therefore, not a defense to strict liability in tort." Perfection Paint and Color Company v. Konduris, (1970) 147 Ind. App. 106, 119, 258 N.E.2d 681, 689. Comment n to § 402A states: "Contributory

negligence of the plaintiff is not a defense when such negligence consists merely in failure to discover the defect in the product, or to guard against the possiblity of its existence." To hold the manufacturer might escape liability for injuries caused by his defectively manufactured or designed product by selling it to an intervening employer and leaving that party with the duty to correct the defect would run counter to the spirit and intent of Comment n.

Given this state of the law, and considering both Defendant's Final Instruction No. 8 and Plaintiff's Final Instruction No. 4, we find no misstatement of the law in the charge to the jury as a whole regarding delegability of the manufacturer's duty to not produce a product with a latent manufacturing or design defect. The last sentence of Plaintiff's Final Instruction No. 4 clearly states the manufacturer's duty

to make a nondefective product is non-delegable. Moreover, we find nothing in the challenged instruction that contradicts or conflicts with Plaintiff's Final Instruction No. 4 as to render the charge as a whole confusing to the jury.

As to the delegability of the duty to warn and instruct, we also find the two instructions taken together correctly state the law.

The two instructions read together do not serve, as Hoffman suggests, to absolve the manufacturer of any duty to warn. Rather they indicate the manufacturer does have a duty to provide warnings or instructions that will reach the ultimate consumer or user. The instructions also indicate the manufacturer has a duty to warn of potential dangers associated with the use of the product that is otherwise free from latent design or manufacturing defects only where he has some control over the

manner in which the employer incorporates the product into his operation. Shanks, supra.

[3] We hold there was no error in the giving of Defendant's Final Instruction No. 8, insofar as the delegability of the manufacturer's duty to warn either of latent manufacturing or design defects or of potential dangers associated with the product's use is concerned.

Hoffman also contends the instruction is an erroneous statement of the law, wherein it states in the second paragraph, "If you find that the plaintiff was . . . inadequately instructed . . . this would constitute misuse of the equipment and be a complete defense to the allegations against E.W. Bliss Company." It is Hoffman's contention this statement is a gross misstatement of the law insofar as the defense of misuse is concerned.

Misuse is a well-recognized defense to

§ 402A strict liability. See, Latimer v. General Motors Corporation (7th Cir.1976), 535 F.2d 1020; American Optical Company v. Weidenhamer, (1980) Ind.App., 404 N.E.2d 606; Dias v. Daisy-Heddon, (1979) Ind.App., 390 N.E.2d 222; Perfection Paint v. Konduris, supra. In the Perfection Paint v. Konduris case the Court of Appeals correctly summarized the nature of the defense of misuse in the following language:

> "[T]he defense of misuse is available when the product is used 'for a purpose not reasonably foreseeable to the manufacturer' or when the product is used 'in a manner not reasonably foreseeable for a reasonably foreseeable purpose.' Cornett v. Searjeant Metal Products, supra (concurring opinion). The contributory negligence of the plaintiff in failing to discover a defect in a product or in failing to guard against the existence of a defect is not misuse of the product and is, therefore, not a defense to strict liability in tort. § 402A, supra, Comment n. at 356. A consumer who incurs or assumes the risk of injury by virtue of his continuing use of a product after having

> discovered a defect or who uses a product in contravention of a legally sufficient warning, misuses the product and, in the context of the defenses of incurred or assumed risk, is subject to the defense of misuse." (Emphasis added). Id. 147 Ind. App. at 119, 258 N.E.2d at 689.

In the case at bar the instruction states that one can be subject to the defense of misuse even where he was "inadequately instructed." However, as the Perfection Paint case makes clear, it is use in a manner contrary to legally sufficient instructions that is misuse. It defies logic to hold a user has misused a product when its danger is not open and obvious and moreover no one has warned the user of the presence of a latent danger associated with the product's use.

[4] We conclude the giving of Defendant's Final Instruction No. 8 was error, as it in part incorrectly states the law. However, Bliss sets forth a number of arguments by which he contends the error is not

reversible error and thus the judgment of the trial court should be affirmed.

First, Bliss contends Hoffman has waived any argument with respect to this alleged error. He claims Hoffman failed to state with the necessary specificity to the trial court the nature of his objection to the instruction. See, New York, Chicago and St. Louis Railroad Company v. Henderson, (1957) 237 Ind. 456, 146 N.E.2d 531.

In the record we find Hoffman's statement of his objection to Defendant's Final Instruction No. 8 articulated as follows:

> "[P]laintiff's Counsel]: Judge, with respect to E.W. Bliss Number 8 instruction, that it is a mandatory instruction and it instructs without having all the elements in it and it doesn't say the sole proximate cause.
>
> * * * * * *
>
> "[P]laintiff's Counsel]: Plaintiff objects to Instruction Number 8 of E.W. Bliss Company, which the Court has indicated it will give for the following reasons: The instruction is a mandatory instruction and does

> not adequately state all of the law which would allow the instruction to state as follows, quote 'Then I instruct you that this would constitute a misuse of the equipment and be a complete defense to the allegations against E.W. Bliss Company.' The instruction further invades the province of the jury and inasmuch as the instruction is a mandatory instruction it fails to limit the complete defense to acts which were the sole proximate cause of the injury. The instruction, if given, should read, 'If you find the Plaintiff was either inadequately instructed and/or failed to use available safety devices which was the sole proximate cause,' and it is not so limited."

[5] Hoffman's objections as stated to the trial court on this point were not as well articulated as they might have been. However, we do not find them so lacking in specificity or clarity as to invoke the principle of Trial Rule 51(C). We hold Hoffman did not waive the objection he now makes on appeal.

In Bemis, supra, we stated:

> "In the area of products liability, based upon negligence or based upon strict liability under § 402A of the Restatement (Second) of Torts, to impress liability upon manufacturers, the defect must be hidden and not normally observable, constituting a latent danger in the use of the product. Although the manufacturer who has actual or constructive knowledge of an unobservable defect or danger is subject to liability for failure to warn of the danger, he has no duty to warn if the danger is open and obvious to all." Id. 427 N.E.2d at 1061.

In Bemis the danger was open and obvious. In the case at bar the danger of a double trip which injured Hoffman was a latent danger of which Hoffman had no warning. We conclude, therefore, the open and obvious danger rule of the Bemis case cannot serve to save the instruction's misstatement of law that use in the face of inadequate warnings is misuse.

[6] Bliss argues that, if we find the instruction to be erroneous, the verdict of the trial court should be affirmed any-

way because the error was cured by the verdict. Our courts have held, despite the erroneous giving of or refusal to give an instruction where the verdict of the jury was correct, there is no cause to reverse the case for a new trial. See, e.g., Campbell v. City of Mishawaka, (1981) Ind.App., 422 N.E.2d 334. To determine if the error in the giving of an instruction is cured by the verdict requires an examination of the record and the evidence to see if the verdict could have been predicated on the erroneous instruction. Stanley v. Johnson, (1979) Ind.App., 395 N.E.2d 863; Joy v. Chau, (1978) 177 Ind. App. 29, 377 N.E.2d 670.

[7,8] If the party complaining of the instruction produced evidence supporting his position, but the jury misunderstanding the law because of their reliance on the erroneous instruction rendered a verdict adverse to the com-

plaining party, then it cannot be said the error in the giving of the instruction was rendered harmless because the verdict was "right" or "clearly right." See, Louisville and Southern Indiana Traction Company v. Cotner, (1919) 71 Ind.App. 377, 125 N.E. 78; Diffenderfer v. City of Jeffersonville, (1917) 67 Ind.App. 10, 118 N.E. 836; Evansville and Terre Haute Railroad Company v. Hoffman, (1914) 56 Ind.App. 530, 105 N.E. 788. Where there is only a general verdict and conflicting evidence exists, it is impossible to tell what state of facts the jury believed existed. See, Louisville, etc., Tractions v. Cotner, supra. In such a case the possiblity the verdict was premised on the erroneous instruction precludes application of the "error cured by the verdict" rule.

Bliss contends the open and obvious danger rule of the Bemis case precludes any recovery for Hoffman in the case at bar

because Hoffman testified he was aware of dangers in the machine. He testified he knew that "the way the machine was set up you could get your hands in it." Further, when asked if the reason he took his foot off the foot pedal each time he reached into the point of operation was "because it was obvious to you what the dangers were" he answered, "Yes."

We cannot agree with Bliss that this testimony brings this case within the Bemis holding, nor does the evidence viewed as a whole. The question turns on how broadly one construes the word "danger" in the "open and obvious danger rule." Certainly we can say it was undisputed in one sense that Hoffman knew the injury-producing mechanism of the machine was an "open and obvious danger." That mechanism was clearly visible. The tremendous force with which the ram descended was apparent.

However, Hoffman's theory as to the

cause of the accident was that due to some internal malfunction or defect in the operating mechanisms of the press, and the concurrent failure of Bliss to warn of this defect, the ram descended without being activated by him. It is clear that whatever this defect or malfunction was, neither Hoffman nor anyone else could see it without making the kind of inspection the user of the product in a § 402A action is not expected to have made. See, Perfection Paint v. Konduris, supra; Restatement (Second) of Torts § 402A, Comment n. Thus, under one theory the danger or defect that caused the cycle of operation to occur was not at all "open and obvious." Hoffman's testimony read in its entirety can be read to be an admission on his part of nothing more than that it was obvious to him there was a danger of injury if one's hand was in the point of operation when the ram for some reason descended. However, it cannot

be read as an admission, nor is there any undisputed evidence in the record that it was apparent, that is, open and obvious, that an uninitiated descent of the ram could or would occur. It is one thing to excuse the manufacturer from liability for injuries caused by dangers which are open and obvious. It is quite another to excuse him from liability for injuries caused by mechanisms that due to a hidden defect cause it to operate or malfunction at a time when the user has every reason to expect it will not. A careful examination of the evidence in each case is necessary to determine whether the danger in the product is truly and entirely open and obvious.

[9] In this case, given the theory of Hoffman as to the cause of the accident and the evidence he introduced to show how it could have occurred, we cannot say as a matter of law Hoffman's injury was caused

by an open and obvious danger. Though Bliss produced evidence tending to show the only way the ram could have descended was by Hoffman's inadvertent tripping of the foot pedal while his hand was in the point of operation, Hoffman produced evidence tending to show the contrary, that the ram's descent was due to either a true double trip or an uninitiated spontaneous cycle of the press. Further, the evidence is undisputed that Bliss provided no warning of such a defect (which the jury could have believed existed) calculated to reach the user of the press. We cannot say the open and obvious danger rule applies so as to render harmless the error in giving Defendant's Final Instruction No. 8.

The only other argument by Bliss as to how we might regard the error in giving the instruction as cured by the verdict is that Shanks, supra, applies so as to permit Bliss to have completely delegated the duty

to warn the ultimate users of the product of the dangers associated with its use to the second party employer, Regency, who purchased it.

Such argument fails in several respects. As we have already noted, in Shanks, supra, the manufacturer had no control over the work space, the hiring, instruction or placement of personnel, and the manner of integration of the product into the employer's operation. We held the manufacturer's duty to warn was therefore fulfilled when he warned the employees of the employer who were responsible for receiving and setting up the product of dangers associated with the use of the product. We said:

> "Because the dryer could be used as a component in a multifaceted complex such as the one created here by [the employer], to allow a jury to examine, in retrospect, the wisdom of A.F.E.'s incorporating some lights or bells into the dryer is to permit nothing more than speculation.

> A complex operation such as this one could have taken many forms, depending on the needs of the owner and the imagination of the designer . . . . The need for any warning devices, and the circumstances surrounding their use, would, of course, depend upon the operation of the whole complex, based upon the features of its design. Thus, because the dryer could be incorporated into a variety of grain handling systems, the desirability or need for such devices could be determined only after any given type of complex had been chosen and created." (Emphasis in original). Id. 416 N.E.2d at 838.

[10] In the case at bar, however, the product is not one installed as a "component in a multifaceted operation," Shanks, supra. Though Regency uses many types of metal fabrication equipment, the Bliss press operates independently of all others. Moreover, Bliss can be charged with constructive knowledge of the fact that no matter who buys its press, the basics of operation are the same: the ram will descend upon triggering by the

operator to smash an impression out of a piece of sheet metal. Bliss is not in a position to claim it could not be charged with awareness of a need to warn operators of the press to keep their hands clear of the point of operation when the press cycles. In the case at bar we cannot say the evidence is undisputed that the duty to warn was completely delegable to the purchaser of the product.

In the Shanks case there was no evidence any manufacturing or design defect was causally related to the accident. We noted, "[B]oth parties acknowledge that the dryer operated exactly as it was intended to operate by A.F.E. and [the employer]." Id., 416 N.E.2d at 837. But in the case at bar Hoffman alleged and offered some evidence to prove the press did not operate as either Regency or Bliss intended, in that the press cycled without initiation by Hoffman, proximately causing

his injuries.

[11] It is clear the manufacturer can never delegate to a second party the duty to warn of the presence of a latent defect and the potential danger in use of the product should the defect become effectively operable. Reliance Insurance v. AL E & C., Limited (7th Cir.1976), 539 F.2d 1101. Thus, whatever may be said about the delegability of Bliss' duty to warn about dangers associated with the use of the product when the product functioned properly, in the case at bar where there is evidence the danger associated with the use of the product is due to the presence of a latent structural defect in the product it cannot be said the manufacturer could delegate its warning duties to any other party.

In summary, Hoffman produced sufficient evidence for the jury to have believed the press was defective in manu-

facture or design, and that such flaw caused an uninitiated cycle of operation to occur. The duty to warn of the fact of the defective manufacture or design was nondelegable by Bliss. Reliance Insurance v. AL E, etc., supra. Moreover he produced sufficient evidence to warrant a jury finding he had no warning from any source as to the propensity of the press to cycle without operator initiation. But the jury, relying on the instruction that they could find he misused the product despite the inadequacy of any warning could have been led to find a complete defense for Bliss. Thus we conclude the jury could have rendered its verdict predicated on an erroneous understanding of the law as communicated to them through the improper instruction. Stanley v. Johnson, supra; Joy v. Chau, supra.

For the foregoing reasons we hold appellant, Kent Hoffman, was prejudiced

by the giving of the erroneous instruction to the jury regarding the defense of misuse. The cause is remanded to the trial court for a new trial in accordance with this opinion.

Reversed and remanded.

PRENTICE and PIVARNIK, JJ., concur.

HUNTER, J., concurs in result with separate opinion in which DeBRULER, J., concurs.

HUNTER, Justice, concurring in result.

I concur in the result of this case and with the Court's conclusion that the giving of defendant's Final Instruction No. 8 was reversible error because it misstates the law on the defense of misuse. I also agree that a manufacturer cannot delegate its duty to produce a nondefective product by assuming that an intervening employer will correct the defect. To allow a delegation of the duty to warn of latent manufacture of design dangers goes against the ex-

pressed policy of Restatement (Second) of Torts, § 402A, which rests on the twin propositions that:

> "(1) the manufacturer of a product sold on the open market undertakes and assumes a responsibility to the public to produce a reasonably safe product; and (2) the public justifiably relies on the expertise of the manufacturer in its expectation that the product is designed to afford reasonable safety in its foreseeable and intended uses." Bemis Co., Inc. v. Rubush, (1981) Ind., 427 N.E.2d 1058, 1067 (Hunter, J., dissenting) (citing Restatement [Second] of torts, § 402A, Comment c).

Thus the basic premise of Section 402A is that primary responsibility for making products safe for their reasonably foreseeable use lies with the manufacturer. Bemis, supra, at 1068. Because the manufacturer is in the best position to know and warn of hidden dangers, it is his responsibility to provide sufficient warnings to make the product as safe as possible. Nissen Trampoline Co. v. Terre

Haute First Nat'l Bank, (1975) Ind.App., 332 N.E.2d 820, rev'd on other grounds, (1977) 265 Ind. 457, 358 N.E.2d 974.

Similarly, a manufacturer should not always be excused from liability because a danger is labeled open and obvious. The duty to make a product safe for its reasonably foreseeable and intended use, i.e., not in "a defective condition unreasonably dangerous," still exists when the dangers are patent. The open and obvious rule, however, provides that if a danger is patent it cannot be unreasonably dangerous. This rule ignores the fact that the test is whether the danger is within the contemplation of the ultimate consumer. The product must be "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics" in order to be actionable under Section 402A.

Bemis Co., Inc. v. Rubush, supra, at 1061; Restatement (Second) of Torts, § 402A, Comment i. Under this test, a consumer may reasonably contemplate that a manufacturer will provide feasible safety devices for foreseeable mishaps. Gilbert v. Stone City Construction Co., Inc., (1976) 171 Ind.App. 418, 357 N.E.2d 738. As stated in 2 Harper & James, THE LAW OF TORTS § 28.5 p. 1543 (1956):

> "[I]f it would be feasible for the maker of the product to install a guard or a safety release, it should be a question for the jury whether reasonable care demanded such a precaution, though its absence is obvious."

Furthermore, obvious dangers are not necessarily appreciated dangers to the user.

To excuse a manufacturer from liability because it has managed to make the dangers open and obvious, without considering whether the danger is reasonable and within the contemplation of the ordinary user, does away with the safety incentive

rationale of strict liability in tort under Section 402A.

> "Whereas Section 402A has universally been interpreted to require manufacturers to avoid latent dangers, they are nonetheless told all they need do to escape liability is to make those dangers patent. It is to say that a manufacturer should refrain from installing protective guards on a product, for those guards might only serve to make the danger less 'open and obvious.' The rule ignores the focus of Section 402A--whether the manufacturer, without impairing the functional capacities of the product and with reasonable additional costs--could have rendered the product reasonably safe. The rule, in short, as many jurisdictions have expressly recognized, encourages misdesign in its obvious form." Bemis, supra, at 1069 (Hunter, J., dissenting).

See, Bexiga v. Havir Mfg. Co., (1972) 60 N.J. 402, 290 A.2d 281; Micallef v. Miehle Co., (1976) 39 N.Y.2d 376, 384 N.Y.S.2d 115, 348 N.E.2d 571; Palmer v. Massey-Ferguson, Inc., (1970) 3 Wash. App. 508, 476 P.2d 713.

The better practice is to consider an open and obvious danger as but one factor when determining whether a product is dangerous beyond the contemplation of the ultimate consumer. Because Indiana has adopted the open and obvious rule, however, I agree that the rule should be narrowly construed and the evidence carefully examined in each case to determine "whether the danger in the product is truly and entirely open and obvious;" Majority Opinion--in other words, whether the danger presented was within the ordinary user's contemplation.

DeBRULER, J., concurs.